IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 10-0035

PATRICK CHEFF,

Appellee/Plaintiff,

v.

BNSF RAILWAY COMPANY, a Corporation,

Appellant/Defendant.

BRIEF OF APPELLANT

On Appeal from the Eighth Judicial District Court
Cascade County Cause No. DV-08-1121
Honorable Dirk M. Sandefur

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in invalidating the release Patrick Cheff executed when he settled his claims for $300,000?

2. Did the District Court abuse its discretion by refusing to admit evidence that Patrick Cheff originally told health care providers he hurt his back weightlifting, not on the job?

3. Did the District Court err in refusing to award interest on the $300,000 judgment offset?

STATEMENT OF THE CASE

This case arises from an alleged workplace injury. The plaintiff's claims were settled for $300,000, and he signed a release. Plaintiff then filed this lawsuit. The District Court invalidated the release.

The plaintiff moved in limine to preclude any reference to the fact that he originally attributed his injury to weightlifting. The District Court granted his motion. BNSF sought reconsideration prior to trial, which the District Court denied.

The jury returned a verdict in the amount of approximately $1.6 million, offset by 15% contributory negligence. BNSF moved for a new trial, which the District Court denied.

BNSF moved to alter or amend the judgment. The District Court granted an offset for the $300,000 BNSF had already paid to the plaintiff in settlement, but refused to reduce the judgment by the interest on that amount. BNSF appeals.

STATEMENT OF FACTS

Plaintiff Patrick Cheff ("Cheff") alleges a workplace injury – a slip and fall in Whitefish, Montana, on January 14, 2006. (Court Record ("CR") 37, ¶¶ 3, 4.) Cheff was a conductor at BNSF. (CR 24, ¶ 1.) When reporting to work, he claims he slipped and fell on ice. (CR 37, ¶ 4.) No one witnessed the fall. (CR 34, Ex. A, 108:1-8.) Cheff did not report the fall to anyone at the time. (CR 34, Ex. A, 108:1-8.) Cheff did not take any steps to fix the alleged workplace hazard, notify anyone about it, nor did he even regard it as a hazard. (CR 34, Ex. A, 40:21-41:6.) Cheff did not submit an injury report to BNSF until over five *months* later. (CR 34, Ex. B.)

The story Cheff initially told his doctors was markedly different from the story he told the jury. On January 27, 2006, Cheff went to see Dr. David Sobba. This was Cheff's first doctor visit after the alleged fall. The office note reads, under the heading "History of Present Illness:"

> The patient is in today for evaluation of his back. He has been having problems with his back for about three weeks. He thinks that he may have slipped that has caused this to kind of come on.

(CR 125, Ex. 49-1.) Not only does this record say nothing about an accident at work, but Cheff's claim of back pain for "about three weeks" significantly predates the alleged January 14, 2006, accident.

Dr. Sobba sent Cheff to get an MRI on February 2, 2006. The MRI record states:

> Low back pain radiating to left leg intermittently for years, increasing *following weightlifting three weeks ago.*

(CR 125, Ex. 503-015 (emphasis added).)

On February 6, 2006, Plaintiff went to the physical therapist pursuant to a referral by Dr. Sobba. The evaluation by the physical therapist, Jay Shaver, reads:

> Client referred to physical therapy with complaints of substantial leg and back pain approximately 1 month ago. Client states *insidious onset from weightlifting without a belt on.* Client denies any previous back injuries.

(CR 125, Ex. 51-1 (emphasis added).)

The first time Cheff's story of being injured on the job appears in any medical provider's records is June 13, 2006, almost *five months* after the alleged accident. (CR 125, Ex. 46-1 - 46-3.) The appearance of this version of events comes just after Dr. Sobba referred Cheff to a neurosurgeon. (CR 125, Ex. 46-1 - 46-3.)

With his first MRI on February 2, 2006, Cheff was diagnosed with an L3-4 herniated disk. (CR 55, Ex. 4, p. 1; Ex. 13, pp. 1-4.) He was also diagnosed with a preexisting spinal condition: congenital stenosis with short pedicles. (CR 55, Ex. 13, p. 2 ("He has a herniated disk at L3-L4 with congenital stenosis and short

pedicles.").) This diagnosis has never been changed or challenged, in this lawsuit or otherwise.

Cheff first visited the office of a neurosurgeon, Dr. Robert Hollis, on June 13, 2006, and was seen by the doctor's assistant. (CR 125, Ex. 46-1 - 46-3.) In Dr. Hollis' records, we first see reference to an "occupational injury." (CR 125, Ex. 46-1 - 46-3.) At that initial visit, options for future care were discussed, including surgery. (CR 125, 23:6-16, Ex. 46-1 - 46-3.)

Two days later (some five months after the alleged accident), Cheff submitted an injury report to BNSF. (CR 34, Ex. B.) In that report, Cheff explained the injury as follows: "When reporting to work on January 14th at west end of shanty I slipped between two buildings." (CR 34, Ex. B.) Cheff alleged BNSF "could have put ice melt on area." (CR 34, Ex. B.)

On June 20, 2006, Cheff visited Dr. Hollis again. After discussing various options, Dr. Hollis recommended surgery (an L3-4 laminoforaminotomy). (CR 125, Ex. 46-6 - 46-7.) The surgery was scheduled for June 30, 2006. (CR 125, Ex. 46-6 - 46-7.) Dr. Hollis explained to Cheff the uncertain outcome of the surgery and the risks inherent in the procedure, particularly with Cheff's congenital condition:

> I have noted the risks given his fact [sic] anatomy, which are [sic] very sagitally orientated, there would be a 25-30% chance of delayed instability with a later need for fusion. He understands and understands the other risks of procedure including infection, bleeding, CSF leak,

neurologic injury, neuropathic pain syndrome, pradural fibrosis and failure of improvement, as well as recurrent disc herniation.

(CR 125, Ex. 46-6 - 46-7.)

BNSF Division Claims Manager Gregg Keller set up a meeting with Cheff, and the two met in Whitefish on June 21, 2006. (CR 23, Ex. 1, 12:10-13:20; 20:2-23.) Keller visited the scene of the alleged fall, and took a recorded statement from Cheff. (CR 23, Ex. 1, 20:2-23; CR 34, Ex. C.) Cheff acknowledged he had never regarded the condition that led to his unwitnessed fall as a "safety issue." (CR 34, Ex. C.)

Despite the disputed liability, uncorroborated circumstances of the accident, and the late reporting, BNSF offered to settle Cheff's claim out-of-service. Specifically, BNSF offered Cheff $300,000 in exchange for a release. Cheff asked for a copy of the release to review that evening and discuss with others. (CR 9, Ex. C; CR 23, Ex. 1, 37:11-38:14.) He also asked for inclusion of a provision to obligate BNSF to pay for any medical for a period of one year, which was added to the release. (CR 23, Ex. 1, 67:12-69:13.)

The following day – June 22, 2006 – Cheff executed the "Release and Settlement Agreement." (CR 9, Ex. C.) Keller recorded another interview with Cheff to remove any doubt that Cheff understood exactly what he was doing. (CR 9, Ex. B.) Keller explained to Cheff that he had a right to bring a lawsuit against

BNSF, that he had the right to bring a FELA claim within three years from the date of his injury, and that he might recover more money or less money than was being offered in settlement. (CR 9, Ex. B.) Cheff said he understood this. (CR 9, Ex. B.) Cheff said he had talked to attorneys about his claim, but had elected to settle the matter directly with BNSF. (CR 9, Ex. B.) Cheff acknowledged he understood the effect of the release, that his injuries "might get worse, might get better, or might remain the same," and that signing the release would preclude him from recovering anything else against BNSF for the injury. (CR 9, Ex. B.)

At the time the parties settled Cheff's claims, they knew he had a herniated disk at L3-4, with congenital stenosis and short pedicles. (CR 55, Ex. 4, p. 1; Ex. 13, pp. 1-4.) Not only was that diagnosis correct, but the seriousness of the injury was clearly understood, as Cheff believed he was permanently disabled and knew his injury could get worse. (CR 108, pp. 146:18-147:2; 160:6-161:10.) Moreover, the doctors warned Cheff his congenital condition increased the likelihood of instability following surgery, and had advised of these risks. (CR 125, Ex. 46-5 - 46-7.)

Knowing exactly what kind of injury he sustained, the serious extent of the injury, and the uncertain outcome of any future surgery or other treatment, Cheff chose to accept the $300,000 being offered and to release BNSF from further liability

for the accident. (CR 9, Exs. B, C.) The release provided, in relevant part, as follows:

> 1. **FOR THE SOLE CONSIDERATION <u>THREE HUNDRED THOUSAND AND NO/100THS</u> ($300,000.00)**, the receipt of which is hereby acknowledged, I, **PATRICK J. CHEFF,** release and forever discharge BNSF Railway Company . . . from all claims and liabilities of every kind or nature, **INCLUDING CLAIMS FOR INJURIES, ILLNESSES, THEIR NATURAL PROGRESSION, OR DAMAGES, IF ANY, WHETHER KNOWN OR UNKNOWN TO ME AT THE PRESENT TIME,** including, but not limited to, claims arising out of any and all of the following:
>
> A. An accident on or about **01/14/06**, at or near **WHITEFISH, MONTANA**, while I was employed as a/an **CONDUCTOR.**
>
> . . .
>
> E. As a result of these injuries, future medical care, including surgery (L3-4 laminoforaminotomy), may be necessary, and BNSF Railway Company hereby agrees to accept billing for medical expenses incurred for treatment rendered to my Back (L3-4), which are directly related to this injury, for a period of 1 Year from the date of this release, not to exceed past 06/22/2007.

(CR 9, Ex. C.) The release concludes with the signatures of Keller, Cheff, and, in Cheff's own hand: "I have read and fully understand the above release." (CR 9, Ex. C.)

Just *five days* after taking the $300,000 and settling his claims, Cheff called Dr. Hollis and cancelled his surgery. (CR 125, 35:13-36:20; 57:14-58:8.) This cancellation had nothing to do with any mistake as to Cheff's candidacy for surgery. (CR 125, 36:14-17 ("On June 27th of '06, our front staff noted that the patient telephoned, and he wants to postpone surgery presumably because he's feeling better.").) Indeed, there are no facts in the record suggesting that the surgery would not have occurred if Cheff had shown up. (CR 125, 35:13-36:20.)

Cheff continued to see Dr. Hollis periodically. In August 2006, Dr. Hollis noted that surgery was not necessary at the time, and that Cheff "does not feel he needs surgical intervention." (CR 125, 37:9-38:3.) Following a January 23, 2007, visit, Dr. Hollis ordered a new MRI and an EMG to seek if there was any progression of injury. (CR 125, Ex. 46-8.) The MRI record stated: "NO NEW ABNORMALITIES IDENTIFIED." (CR 125, Ex. 46-12.)

On February 20, 2007, when Cheff visited Dr. Hollis as follow-up to the MRI, Dr. Hollis noted Cheff was "not eager to proceed with surgery. . . ." (CR 125, Ex. 46-9.) Dr. Hollis agreed surgery was not advisable at the time, as Cheff's congenital spinal condition increased the risk of instability following surgery. (CR 125, Ex. 46-9.) If this potential instability required a fusion procedure, Cheff's congenitally small pedicles would make "cannulation for pedicle screw fixation

precarious at best." (CR 125, Ex. 46-9.) Of course, this congenital condition was not a new revelation – Cheff knew about it for months before reporting the alleged accident to BNSF. (CR 55, Ex. 4, p. 1; Ex. 13, pp. 1-4.) While Dr. Hollis did not recommend surgery in February 2007, or even at Cheff's last visit to his office on December 30, 2008, he is of the opinion that surgical intervention will probably be necessary some time in the future. (CR 125, 53:25-54:14.)

In August 2008, Cheff sued BNSF. (CR 1.) His claimed damages in the lawsuit arise from the very same L3-4 back injury the parties knew about, discussed, and intended to cover in the release. (CR 37.) Nonetheless, the District Court invalidated the release as a matter of law. (CR 58, Appendix A.) It found the release invalid on the basis of mutual mistake of fact, constructive fraud, and lack of consideration. (App. A.) That ruling is one of the issues on appeal.

Prior to trial, Cheff moved in limine to preclude any reference to non-work-related causes, and specifically his own descriptions to medical providers of weightlifting as the precipitating event of his back pain. (CR 55.) BNSF made clear the information would be used to dispute causation and challenge Cheff's credibility as the only witness to the accident, *not* to apportion damages. (CR 56, 98.) The District Court granted Cheff's motion, however, finding the evidence was

inadmissible without BNSF providing expert medical testimony on causation. (CR 55; CR 67, Appendix B.)

BNSF raised the issue again prior to trial. (CR 98.) BNSF informed the court that it had recently cross-examined Dr. Hollis during a perpetuation deposition. (Trial Transcript, Appendix E, pp. 9-10.) Dr. Hollis testified he had never seen Cheff's prior history regarding weightlifting. (CR 125, 60:2-64:7.) Dr. Hollis conceded the obvious – that Cheff's injury would be consistent with a weightlifting injury. (CR 125, 60:2-64:7.) The doctor further testified that his opinion on causation was based on Cheff's own story of the accident. (CR 125, 60:2-64:7.) Had Cheff told him the injury was caused by weightlifting and stuck with that story, the doctor's conclusion on causation would have been weightlifting. (CR 125, 60:2-64:7.) Still, the District Court refused to admit the evidence. (Trial Tr., p. 297.)

The case was tried before a jury. The jury heard nothing about the information in Cheff's medical records that contradicted his claim of a workplace injury. In addition, Cheff took unfair advantage of the order in limine by arguing to the jury that BNSF, "with all of their [sic] investigative authority," was unable to develop information contradicting Cheff's story. (Trial Tr., p. 935.) The jury returned a verdict in the amount of approximately $1.6 million, offset by 15% contributory negligence. (CR 131.)

BNSF moved for a new trial on the basis of *Clark v. Bell*, 2009 MT 390, ¶ 16, 353 Mont. 331, 220 P.3d 650, issued just after the verdict in this lawsuit. (CR 146.) The motion was denied. (CR 168, Appendix C.)

BNSF also moved to alter or amend the judgment. (CR 148.) The District Court granted a $300,000 offset (the amount BNSF paid in settlement) but refused to account for the interest on that amount. (App. C.)

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*, using the same criteria set forth in Mont. R. Civ. P. 56. *Sinclair v. Burlington Northern & Santa Fe Ry. Co.*, 2008 MT 424, ¶ 26, 347 Mont. 395, 200 P.3d 46.

Determinations regarding the admissibility of evidence are reviewed under an abuse of discretion standard, as are rulings on motions for new trial. *Clark*, ¶¶ 16, 18.

SUMMARY OF ARGUMENT

This case should never have gone to trial. Cheff's claims were legitimately settled. A mutual mistake of fact is sufficient to void a release only when the mistake goes to the *nature of the injury*. Here, the parties knew *exactly* what the injury was. They knew about Cheff's congenital condition and the increased risks it posed. While the parties, at the time of settlement, thought Cheff *might* undergo surgery, this fact goes to future course of healing, which parties to a release are not required to

predict. Further, the surgery did not go forward as scheduled because *Cheff was feeling better,* not because of any mistake of fact. Indeed, to this day, surgical intervention has never been taken off the table. There was no "mistake of fact," and even if there was, it had nothing to do with the nature of Cheff's injury.

The District Court also erred by invalidating the release on the basis of constructive fraud. The validity of a release in a FELA action is governed by federal law. Federal law requires proof that the worker was intentionally deceived about the contents of the release. Here, the District Court expressly acknowledged Cheff did *not* prove actual intent, but nonetheless granted summary judgment to Cheff on the lesser state law standard of constructive fraud. It also overlooked disputed issues of fact as to whether the specific release language *requested by Cheff* was in any way misleading.

Further, the release was supported by consideration. Consideration exists whenever the employee receives something of value to which he had no previous right. Cheff received $300,000 to which he had no previous right. Even assuming this amount was somehow inadequate, disputed issues of fact exist as to whether Cheff had a right to continued medical benefits.

After invalidating the release, the District Court abused its discretion by refusing to admit evidence that Cheff originally attributed his back injury to

weightlifting. BNSF did not seek to apportion Cheff's damages, but to demonstrate his injury did not arise from the alleged workplace accident. Expert medical testimony on causation is required where divisibility of injury is an issue, but not every time causation is challenged. The same evidence should have been allowed to challenge Cheff's credibility as the only witness to the alleged workplace accident.

Finally, the District Court erred in refusing to award interest on the $300,000 previously paid to Cheff. Upon contract rescission, the court's task is to restore the parties to their pre-contract position.

ARGUMENT

I. THE DISTRICT COURT ERRED BY INVALIDATING THE RELEASE.

Litigation is not an inevitable outcome of every disputed claim under the FELA. FELA claims may be settled, and a release of FELA claims can have the same effect as any other release. *See, e.g., Callen v. Pennsylvania R.R. Co.*, 332 U.S. 625, 631-32 (1948) ("Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation.")

The validity of a release under FELA raises a federal question to be determined by federal law. *Bevacqua v. Union Pac. R.R. Co.*, 1998 MT 120, ¶ 70, 289 Mont. 36, 960 P.2d 273; *Maynard v. Durham & Southern Ry. Co.*, 365 U.S. 160 (1961). The

U.S. Supreme Court has noted that releases play an important part in the FELA's administration and "[t]heir validity is but one of the many interrelated questions that must constantly be determined in these cases according to a uniform federal law." *Dice v. Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359, 362 (1952).

The burden is on the party challenging the release to establish its invalidity. *Callen*, 332 U.S. at 630. To sustain his burden, Cheff must prove at least one of the following: (1) mutual mistake of fact; (2) fraud in the inducement; or (3) want of consideration. *See Counts v. Burlington Northern R.R. Co.*, 952 F.2d 1136, 1142 (9th Cir. 1991); *Brophy v. Cincinnati, New Orleans, & Texas Pacific Ry. Co.*, 855 F.Supp. 213, 215 (S.D. Ohio 1994). If none of these deficiencies exist, a release is enforceable to the extent its scope comports with § 5 of the FELA. *Sinclair*, ¶ 38.

A. There Was No Mutual Mistake of Fact.

Under appropriate circumstances, a FELA release may be set aside on the basis of mutual mistake of fact. *Bevacqua,* ¶ 70. "However, under FELA, a mutual mistake of fact is sufficient to avoid a release only when the mistake goes to the *nature of the injury* and the mistaken belief is held by both parties." *Id.* (emphasis added). In other words, a release will not be invalidated simply because the parties had mistaken expectations or hopes about the releasor's future recovery. *See Wilson v. CSX Transp., Inc.*, 83 F.3d 742, 745 (6th Cir. 1966) (mistake must go to "the nature

of the injury, not the expected course of healing."); *Manis v. CSX Transp., Inc.*, 806 F.Supp. 177, 179 (N.D. Ohio 1992) (same).

In evaluating the validity of a FELA release, there is a critical distinction between diagnosis and prognosis. *See Loose v. Consolidated Rail Corp.*, 534 F.Supp. 260, 263-64 (D. Penn. 1982). This makes sense. The parties should have an understanding about the nature of the injury, but are not expected to know the future. Generally, if the diagnosis is accurate, the release may not be set aside on the basis of mistake. *See Bevacqua*, ¶ 70. As one court explained:

> [A] mutual mistake concerning the extent and outcome of injuries are necessarily future rather than present facts (and should not serve as grounds for setting aside a release), whereas a mutual mistake concerning the nature of the injuries is a present fact. The legal distinction must rest on the medical difference between diagnosis and prognosis.

Loose, 534 F.Supp. at 264 (internal quotation marks omitted).

Having an accurate diagnosis, a party to a release cannot later claim the nature of the injury was unknown. *See Edwards v. Western & Atlantic R.R.*, 552 F.2d 137 (5th Cir. 1977) (release upheld where "[t]he undisputed facts show, at most, a mistake as to the expected course of healing of plaintiff's injury, and not as to its nature."); *compare Taylor v. Chesapeake & Ohio Ry.*, 518 F.2d 536 (4th Cir. 1975) (mutual mistake existed where diagnosis was a simple back sprain, when in fact the plaintiff had a ruptured disc); *Dice*, 342 U.S. at 361 (mutual mistake existed where diagnosis

was superficial injuries to the worker's neck, back and limbs, when in fact the accident caused idopathic retroperitoneal fibrosis).

If parties settling a FELA claim were saddled with the impossible burden of having to predict the accuracy of a given *prognosis*, settlement would be of little utility. *See Roberston v. Douglas Steamship Co.*, 510 F.2d 829, 836 (5th Cir. 1975). Such a rule would inevitably discourage settlement:

> There would be very little security in the settlement of a personal injury claim if the binding effect of such a settlement depended upon the certainty of the extent and the outcome of the injuries involved. It is the very consequences of these uncertainties which the parties seek to foreclose by settlement and to take their chances on their outcome.

Id., 510 F.2d at 836 (*quoting Strange v. Gulf & Southern S.S. Co.*, 495 F.2d 1235 (5th Cir. 1974)). The law does not require parties to a release to be fortunetellers. *See id.*

This Court has recognized the distinction between a faulty diagnosis and a faulty prognosis in the FELA context. *See Bevacqua*, ¶ 70. In *Bevacqua*, a FELA release was set aside due to mistaken diagnosis. *See id.*, ¶¶ 71-72. Doctors told Bevacqua he had a simple sprain and no permanent injury, but in truth he had a ruptured ACL and torn meniscus. *See id.* The Court found Bevacqua was "lulled into believing that nothing was wrong with his knee because of the repeated assurances by the various doctors that examined him at UP's request." *See id.*

Here, by contrast, Cheff and BNSF knew Cheff had sustained an L3-4 herniated disk. Cheff also knew about his congenital condition. Cheff has never argued the diagnosis was wrong, nor has he argued the extent and severity of his L3-4 injury is greater or different than diagnosed. With an accurate understanding of the nature of his injury, Cheff entered into the settlement agreement and received $300,000. He confirmed in a recorded statement that he understood the effect of the release he signed.

Given these facts, the District Court took an unprecedented step in finding a mutual mistake of fact. It relied on the mere fact that the parties, at the time of settlement, thought Cheff *might* undergo surgery (an L3-4 laminoforaminotomy). Soon after the release was signed, Cheff called the surgery off because he was feeling better. Later, Cheff still wanted to avoid surgery, and Dr. Hollis agreed, reiterating the increased risks occasioned by Cheff's congenital condition. Dr. Hollis still thinks surgery will be necessary at a later date. When and whether Cheff has surgery is precisely the kind of future course of healing that the parties to a FELA release are *not* required to foretell. *See, e.g., Loose*, 534 F.Supp. at 264.

The District Court relied on factually distinguishable cases involving mis-diagnosed injuries and/or injuries that were grossly underappreciated at the time of settlement. *See, e.g., Ignacic v. Penn Central Transp. Co.*, 436 A.2d 192

(Pa. Super. 1981). *Ignacic*, for instance, involved a slip and fall by a railroad worker. *See id.*, 436 A.2d at 194. A month after the accident, the worker's symptoms had abated and his doctor said he could return to work, which he did. *Id.* Both parties thought he was fully recovered. *Id.* Ignacic took $2,250 in settlement and signed a release. *Id.* However, unbeknownst to the parties, he had sustained a weakened transverse ligament. *Id.* The severity of the injury became apparent when he had to be hospitalized for an extended period, became temporarily paralyzed in all four extremities, and was not able to return to work until over 15 months later. *Id.* Even under those facts, the court did not invalidate the release, but found a genuine issue existed as to whether the parties were operating under a mutual mistake of fact. *See id.*

Unlike *Ignacic*, the extent and severity of Cheff's L3-4 back injury was understood at the time of settlement. Assuming a "mistake" existed at all, it only concerned his future course of treatment – a potential surgery that, if performed, would have absolutely no guarantee of success, as Dr. Hollis clearly explained.

Cheff also relied on a federal district court order that, like *Ignacic*, involved a situation where the parties were grossly mistaken about the severity of the worker's injury. *See Whitten v. Burlington Northern & Santa Fe Ry. Co.*, U.S. District Court, District of Montana, CV 98-163-M-DWM (April 19, 2000). *See* Supplemental

Appendix A. In *Whitten*, the worker was diagnosed with four disc herniations and a "sprain or strain." *Id.* at 2. At the time the release was executed, "[e]veryone involved believed Whitten had no serious medical problem." *Id.* However, less than two months later, Whitten suddenly lost all feeling in his legs. *Id.* at 4. He began to experience incontinence and then paraplegia. *Id.* He was diagnosed with cauda equina syndrome, which was a direct consequence of the work-related injury. *Id.* The court determined "the medical view held by Whitten and his health care providers was ominously mistaken." *Id.* at 5.

Cheff convinced the District Court that this case is similar to *Whitten* and *Ignacic*, but nothing could be further from the truth. This is not a case in which the parties misunderstood the diagnosis, or even the severity of an injury accurately diagnosed. There is no evidence that Cheff's injuries were more serious than the parties thought, or that they progressed any differently than the parties expected. The only "mistake" alleged is that Cheff intended to have surgery but, as yet, has not. In sum, there was no "mutual mistake of fact" at all, let alone a mistake that went to the nature of Cheff's injury.

The record demonstrates the parties knew what the injury was, the extent of the injury, and the risks involved. This is what makes this case so dramatically different from those relied upon by the District Court. And although the risks of surgery are

higher because of Cheff's congenital condition, this condition was known before the settlement and, regardless, is not attributable to BNSF. *See* Supp. App. A, p. 11 ("Summary judgment for Whitten might still be precluded if the railroad contended that his condition did not develop from his herniated discs but had an undetected congenital or other spontaneous origin.").

Settlements should be promoted, not discouraged. The analysis adopted by the District Court renders it almost impossible to effectively settle any claim under the FELA. Its analysis was contrary to the law and to sound policy.

B. The Release Comports With § 5 of the FELA.

The District Court did not explicitly find the scope of the release violated § 5 of the FELA, but relied heavily on cases which addressed that question. For this reason, and following this Court's analytical framework in *Sinclair*, Cheff will address § 5 here. Just as there was no mutual mistake of fact, the release represents a bargained-for settlement of a specific injury and, as such, complies with the FELA.

A release may be otherwise valid, but its scope limited by § 5 of the FELA. *Sinclair*, ¶ 38. The specific statutory provision reads, in pertinent part, as follows:

> Any contract, rule regulation or device whatsoever, the purpose or intent of which shall be to enable the common carrier to exempt itself from any liability created by this Chapter, shall to that extent be void. . . .

45 U.S.C. § 55.

As noted, the U.S. Supreme Court has recognized that a release may be obtained without violating § 5. *Callen*, 332 U.S. at 626-27 ("It is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility.") Thus, cases addressing § 5 of the FELA generally involve the questioned validity of boilerplate release language. The two seminal federal cases come from the Sixth and Third Circuits. *See Babbitt v. Norfolk & Western Ry. Co.*, 104 F.3d 89 (6th Cir. 1997) and *Wicker v. Consolidated Rail Corp.*, 142 F.3d 690 (3d Cir. 1998).

This Court rejected *Babbitt's* bright line rule in favor of the Third Circuit's analysis in *Wicker*. *See Sinclair*, ¶ 53. The *Wicker* court determined that a FELA release is valid not only for known *injuries*, but also for known *risks*. *See Wicker*, 142 F.3d at 701. *Wicker* involved five former employees who sued the railroad for exposure to toxic chemicals. *See id.*, 142 F.3d at 692-93. Each had executed a general release *in the course of settling an unrelated FELA claim*. *See id.* The *Wicker* court determined that future risks may be released as long as they are known by the parties:

> [I]t is entirely conceivable that both employee and employer could fully comprehend future risks and potential liabilities and, for different reasons, want an immediate and permanent settlement. The employer may desire to quantify and limit its future liabilities and the employee may desire an immediate settlement rather than waiting to see if injuries develop in the future. To put it another way, the parties may want to

> settle controversies about potential liability and damages related to known risks even if there is no present manifestation of injury.

Id., 142 F.3d at 700-01.

The release in *Wicker* did not preclude the plaintiffs' claims for toxic exposure because there was no evidence the parties, in settling the unrelated FELA claim, were aware of the potential health risks to which they had been exposed. *See id.*, 142 F.3d at 702. The court noted the story would have been different had the release specifically referenced "toxic exposure" as a risk. *See id.*, 142 F.3d at 701.

This Court adopted "the standard set forth in *Wicker* to determine the validity and scope of a FELA release in light of § 5 of that act." *Sinclair*, ¶ 53 (*citing, inter alia, Jaqua v. Canadian Nat. R.R. Inc.*, 734 N.W.2d 228, 229 (Mich. App. 2007)). In *Sinclair*, the worker sued the railroad for manganese poisoning. *Sinclair*, ¶¶ 6-9. He had previously settled claims against the railroad for cumulative trauma injuries and a separate slip and fall. *Id.*, ¶¶ 2, 3. The district court determined as a matter of law the prior release precluded his manganese poisoning claims. *Id.*, ¶ 15. This Court reversed and remanded, finding genuine issues existed regarding the parties' intent:

> While Sinclair might have arguably known of the risk of injury from toxic exposure to manganese, it is another thing to say that there is no genuine issue of material fact as to whether he and BNSF intended to release this claim when they entered into the release. Under *Wicker*, the language of the release in this case is not sufficient to show an absence of a genuine issue of material fact because it makes only a general mention of chemical exposure, and does not spell out the 'quantity,

> location and duration' of the manganese exposure. For that matter, the release does not even specifically mention exposure to manganese poisoning at all.

Id., ¶ 54. Because the language of the release was not conclusive, and because there was extrinsic evidence showing the parties did not intend to cover manganese poisoning in the release, this Court found a genuine issue for trial. *Id.*

The District Court's rulings in this case stray dramatically from *Sinclair*. Despite overwhelming and uncontroverted evidence that the parties intended to release Cheff's L3-4 herniated disk, the District Court deemed all material facts "undisputed" and granted summary judgment to Cheff! At the very least, it should have allowed the issue to go to trial. *See Sinclair,* ¶ 54 (genuine issue on parties' intent in executing release); *see also, e.g., Smith v. Chicago, Rock Island and Pacific R.R. Co.*, 525 P.2d 1404, 1407 (Okla. App. 1974) (genuine issue existed where the parties were unaware of herniated disk in worker's neck); *Graham v. Atchison T. & S.F. R.R.*, 176 F.2d 819 (9th Cir. 1949) (genuine issue existed where statements of physician may have caused worker to underestimate the seriousness and extent of his injuries).

The scope of the release was appropriate under § 5 of the FELA. This is not a case involving the scope of boilerplate release language and whether it encompasses additional injuries or risks. Here, the L3-4 back injury was specifically referenced in

the release itself, and BNSF took a recorded statement from Cheff to confirm he understood the nature of his injury, the risks involved, and the scope and effect of the release. The release should have been enforced.

C. There Was No Fraud.

As an additional basis for invalidating the release, the District Court found "constructive fraud in the inducement based on the material misrepresentation by the BNSF claims agent that BNSF would extend, or cause extension, of Plaintiff's employment medical care benefits until January 1, 2010." (App. A, p. 2.) The District Court found this was a misrepresentation because, allegedly, Cheff would have been entitled to these benefits anyway. The District Court disregarded disputed issues of fact on this point, and applied the wrong legal standard.

1. Cheff Was Required To Prove Actual Intent.

"The validity of a release in a FELA action is governed by federal rather than state law." *Bevacqua*, ¶ 70. The federal standard is "fraud in the inducement," and it differs significantly from a state law cause of action for constructive fraud. *See Dice*, 342 U.S. at 362. The U.S. Supreme Court has set forth the applicable rule: "We hold that the correct federal rule is . . . a release of rights under the Act is void when the employee is induced to sign it by the *deliberately false* and material statements of the

railroad's authorized representatives made to *deceive* the employee as to the contents of the release." *See id.* (emphasis added); *see also Sinclair*, ¶ 13.

Here, the District Court found that Cheff had *not* made a showing that BNSF's "misrepresentation" was deliberate. (June 16, 2009, Hearing Transcript, Appendix D, p. 121 ("[G]enuine issues of material fact preclude summary judgment to the Plaintiff on his cross motion for summary judgment on the basis of actual fraud.").) It then employed a lesser state law standard that does not require a showing of intent. Application of a state law standard to a federal claim was error.

Cases applying the correct federal rule demonstrate constructive fraud is insufficient to invalidate a release. *See Counts*, 952 F.2d 1136. In *Counts*, the Ninth Circuit found the District Court erred in instructing the jury on a lesser standard of fraud. *Id.*, 952 F.2d at 1141. While it was proper to provide instruction on the elements of *actual fraud*, it was error to suggest fraud could be established by the railroad's failure to explain the employee's FELA rights:

> The jury was instructed in this case on the five elements of fraud and that it could find the release invalid if Counts was induced to sign the release by deliberately false and material statements of the railroad. The jury was also instructed it could find the release invalid based upon fraud if its execution was materially induced by Burlington's failure to explain to Counts the full scope of FELA rights and benefits. . . .
>
> . . .

> While there is evidence of fraud and overreaching in this case, it was error to instruct the jury that Counts could show fraud *either* by proving the elements of fraud *or* by simply showing failure to fully explain his FELA rights. The second fraud instruction relieved Counts of his burden to prove the elements of fraud. . . .

Id., 952 F.2d at 1141 (emphasis in original).

Here too, Cheff was relieved of his burden to prove the elements of fraud in the inducement, which clearly include *scienter*. *See Dice*, 342 U.S. at 362. Constructive fraud under Montana law is not consistent with this standard, as the District Court's ruling from the bench demonstrates:

> Accordingly, pursuant to 28-2-206, MCA, and *H-D Irrigating [Inc. v. Kimball Properties, Inc.*, 2000 MT 212, ¶¶ 25, 26, 301 Mont. 34, 8 P.3d 95], and as pertinent here, constructive fraud occurs where:
>
> (1) *without actual intent to deceive*, a party creates a false impression in another by words or conduct regarding facts material to a transaction;
>
> (2) the party fails to disclose relevant facts; and
>
> (3) the party thereby gains an advantage over the other party to the other party's detriment or prejudice.

(App. D, p. 123 (emphasis added).)

The District Court invalidated the release based upon Montana's definition of constructive fraud. It found BNSF had failed to correct a "false impression" that if Cheff signed the agreement, his medical benefits coverage would be extended until January 1, 2010. (App. D, p. 125.) It disregarded disputed facts in this regard, and

relieved Cheff from having to prove the elements of fraud in the inducement. *See Counts*, 952 F.2d at 1136; *Sinclair*, ¶¶ 13, 35 (rejecting employee's fraud claim under state law and holding validity of release could only be challenged "if there was fraud in the inducement as defined under federal law.").

Moreover, the District Court's reliance on a 1979 Oklahoma case lends no support for its conclusion. (App. D, pp. 122-23 (*citing Faulkenberry v. Kansas City Southern Ry. Co.*, 602 P.2d 203 (Okla. 1979).) In *Faulkenberry,* the Oklahoma Supreme Court commented that "[f]raud, a generic term with multiple meanings, is divided into actual and constructive." 602 P.2d at 205-06. *Faulkenberry* predates *Counts* by 12 years and *Sinclair* by 29 years, and its discussion about constructive fraud is based exclusively on Oklahoma law. *See id.* Even so, the *Faulkenberry* court did not invalidate the release on the basis of constructive fraud – it submitted the issue of fraud to the jury. *See id.*

The federal rule is clear and has been recognized by this Court. *See Sinclair*, ¶¶ 13, 35. To invalidate a FELA release, Cheff must demonstrate the elements of fraud in the inducement, including actual intent. *See Dice*, 342 U.S. at 362. The District Court held Cheff did not meet this burden. (App. A, p. 3; App. D, p. 121.)

2. Disputed Facts Were Disregarded.

Even assuming arguendo that Montana's definition of constructive fraud sufficed as the applicable legal standard, the District Court disregarded disputed issues of fact. The release contained a provision whereby BNSF would accept billing for medical expenses incurred as a result of the L3-4 back injury for a period of one year from the date of the release. (CR 9, Ex. C.) The provision was included because *Cheff specifically asked for it*! (CR 23, Ex. 1, 67:12-69:13.)

The District Court deemed the requested provision misleading and concluded Cheff would have been entitled to medical benefits during this period anyway. (App. D, pp. 127-28.) But at the summary judgment hearing, the District Court heard testimony from BNSF that, normally, all insurance benefits end on the date the employee "quits" as part of an out-of-service settlement. (June 16, 2009, Hearing Tr., pp. 86-94.) While it is true that Cheff would have been entitled to a certain period of continued medical benefits had he become disabled *but not quit*, that is not what happened:

> [W]hether it's cancer, whether it's a car accident, whether it's an on-the-job injury, disability is disability. If they [employees under a collective bargaining agreement] meet the requirements of United Healthcare, they continue on [with medical benefits]. However, if they quit, then they do not.

(June 16, 2009, Hearing Tr., p. 92.)

In sum, there were disputed issues of fact about whether the "false impression" BNSF failed to correct by including a provision – a provision Cheff specifically asked for – was, in fact, "false." And even assuming it was, Cheff failed to prove fraud in the inducement. *See Counts,* 952 F.2d at 1136.

D. The Release Was Supported by Consideration.

Despite the fact that Cheff received $300,000, the District Court invalidated the release for want of consideration. It determined that "BNSF promised to extend Plaintiff's employment medical care benefits past the date of settlement and release," but, in fact, he already had a "vested employment contract right" to such an extension. (App. A, p. 2.) The District Court overlooked disputed issues of fact in this regard, and did not apply the correct legal standard.

The U.S. Supreme Court has set forth the "correct rule" on adequacy of consideration for a FELA release:

> In order that there may be consideration, there must be mutual concessions. A release is not supported by sufficient consideration unless *something of value is received to which the creditor had no previous right.* If, in other words, an employee receives wages to which he had an absolute right, the fact that the amount is called consideration for a release does not make the release valid.

Maynard, 365 U.S. at 163 (emphasis added) (*quoting Burns v. Northern Pacific Ry. Co.*, 134 F.2d 766, 770 (8th Cir. 1943)).

The question of consideration arises if the amount received in settlement was owed to the employee anyway. *See id.* In *Maynard*, for example, the employee argued that the $144.60 he received in settlement was simply his paycheck. *See id.* The court found a genuine issue for trial on the question. *See id.*

Similarly, in *Loose*, the employee claimed the vast bulk of the settlement amount was for gross back wages, plus an additional $43.57. 534 F.Supp. at 264-65. The court pointed out that the amount was still in excess of the back wages owed, though only slightly. *See id.* The court also noted that because receipt of the money as part of a settlement represented "significant tax savings," the employee received valuable consideration for the release. *See id.*

In *Counts*, the Ninth Circuit rejected a jury instruction that read "[a] release is not supported by adequate consideration if there is a large disparity between the amount of the release and the actual monetary loss." 952 F.2d at 1140. In that case, the employee argued a substantial portion of the settlement amount consisted of wages he was already entitled to for a guaranteed job. *See id.* The court, however, noted that "he received $70,423 in addition to his wage entitlement." *Id.* As such, the release was supported by consideration and the issue should not have been submitted to the jury. *See id.*

Here, Cheff does not argue that the $300,000 he received was already owed to him. The entire settlement amount was advanced to resolve a disputed injury claim. Further, the language of the release demonstrates the $300,000 constituted the sole consideration for the release: "FOR SOLE CONSIDERATION THREE HUNDRED THOUSAND AND NO/100THS $300,000. . . ." (CR 9, Ex. C.)

The District Court seemed to find that whenever a release or settlement agreement even references some benefit to which the worker is already entitled, it is automatically void for lack of consideration. As the cases above attest, that is not the law. Further, the provision at issue here was inserted at Cheff's request. There is no dispute that Cheff had no prior right to the "SOLE CONSIDERATION" of $300,000. Moreover, Cheff did not have an automatic entitlement to continued benefits. At the very least, there were disputed issues of fact in this regard. The District Court erred in finding the release lacked consideration.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO ADMIT EVIDENCE THAT CHEFF ORIGINALLY ATTRIBUTED HIS BACK INJURY TO WEIGHTLIFTING.

Cheff's fall was witnessed by no one. Still, his medical experts testified the fall caused his injury because *that is what Cheff told them.* Initially, though, he told a different story. The first clear story he told was that he injured his back while weightlifting. This version of events is contained in the records of two different

caregivers. The District Court applied Montana law on *apportionment of damages* – something that was never at issue in this case – to exclude evidence that struck at the heart of Cheff's FELA claim.

A. Proving Causation Was Cheff's Burden, Not BNSF's.

BNSF never sought to apportion Cheff's damages to another party, cause, or injury. Instead, BNSF sought to prove Cheff's injury did not arise from the alleged workplace accident at all. Cheff, as the plaintiff, had the burden to prove causation by a preponderance of the evidence, and BNSF had the right to challenge that element of his claim. *See, e.g., Henricksen v. State*, 2004 MT 20, ¶ 20, 319 Mont. 307, 84 P.3d 38; *see also* Mont. Code Ann. §§ 26-1-401, 26-1-403.

The District Court disagreed. It interpreted Montana case law on apportionment of damages as essentially *reversing* the burden of proof. (*See* App. B, p. 18.) It compounded its error by failing to apply federal law. BNSF repeatedly pointed out that FELA claims are governed by federal law. *See Maynard*, 365 U.S. 160. The "proper measure of damages [under the FELA] is inseparably connected with the right of action," and therefore is an issue of substance that "must be settled according to general principles of law as administered in the federal courts." *Chesapeake & Ohio R. Co. v. Kelly*, 241 U.S. 485, 491 (1916); *St. Louis Southwestern R. Co. v. Dickerson*, 470 U.S. 409, 411

(1985). Thus, even assuming apportionment was at issue, which it is not, under federal FELA law apportionment can be proved *without* expert testimony. *See Sauer v. BNSF Ry.*, 106 F.3d 1490, 1494 (10th Cir. 1997) ("The evidence need only be sufficient to permit a rough practical apportionment.").

Under the District Court's interpretation, whenever a defendant intends to deny causation by pointing to evidence of other causes, it has to prove causation with expert testimony and to a reasonable medical certainty:

> BNSF has neither obtained nor noticed sufficient expert causation testimony to present direct evidence or argument that something other than the disputed on-the-job slip and fall, such as Plaintiff's off-the-job weightlifting or other sporting activity, independently caused or contributed to his claimed back injury. Consequently, the *Truman* analysis clearly bars BNSF from presenting evidence or argument that Plaintiff's alleged weightlifting or other sporting activity was an independent or contributing cause of his claimed back injury in this case.

(App. B, p. 18 (citing *Truman v. Montana Eleventh Judicial Dist. Court*, 2003 MT 91, 315 Mont. 165, 68 P.3d 654).)

The *Truman* analysis does no such thing. In *Truman*, it was undisputed that the plaintiff's vehicle was struck by the defendant's vehicle, causing injury. *Id.*, ¶ 5. The plaintiff was involved in two subsequent accidents, however, and the question arose as to what *portion* of the plaintiff's damages could be attributed to the defendant's conduct. *See id.*, ¶ 32. The Court found that where a defendant seeks

to *apportion* damages, it must prove with medical evidence that the injury is divisible. *See id.* In this case, however, BNSF's position was clear – Cheff was making up his workplace injury claim.

Shortly after trial of this case, this Court issued its decision in *Clark*, and stated quite clearly that the *Truman* analysis, and specifically the requirement of expert medical causation testimony by the defense, is limited to cases where an alleged tortfeasor asserts an affirmative defense to limit the *portion* of damages he is liable for:

> *Truman* did not disturb the basic right to challenge causation . . . . *Truman* affirmed that a defendant is permitted to submit relevant evidence of subsequent accidents to negate allegations that he is the cause or sole cause of an injury. . . . However, *Truman* clarified that if a defendant asserts he or she is only liable for *a portion of* those damages, or, in other words, asserts that the plaintiff's injuries can be apportioned to other causes and wants the jury to reduce the defendant's obligation by *the portion of* plaintiff's damages for which he has proven he is not responsible, then the defendant must prove, by a reasonable medical probability, that the injury is divisible.

Clark, ¶ 23 (emphasis in original) (internal citations and quotation marks omitted).

Cases subsequent to *Truman* demonstrate that expert testimony is not the only means by which a defendant can challenge causation. In *Clark*, as here, the defendant had no medical experts to testify on alternate cause. *See id.*, ¶ 27. Nonetheless, she was allowed to discuss evidence of the plaintiff's preexisting injuries in opening statement, and to use the evidence in cross examining the

plaintiff's experts. *See id.*, ¶ 11, 26. This was proper because "Bell used this evidence to challenge Clark's claim that Bell was the cause of Clark's injuries, and did not seek jury apportionment of Clark's injuries." *Id.*; *see also Ele v. Ehnes*, 2003 MT 131, ¶¶ 5, 7, 316 Mont. 69, 68 P.3d 835 (defendant challenging causation presented no medical experts, but was allowed to cross-examine the plaintiff and her experts regarding pre-existing conditions); *Reed v. Montana Rail Link*, U.S. District Court, District of Montana, CV 08-34-M-JCL (March 31, 2009) (applying Montana law and denying the plaintiff's motion in limine because MRL intended "to offer evidence of alternate causation . . . not evidence of apportionment of liability between or among MRL and some other potential tortfeasor."). *See* Supplemental Appendix B.

All of the cases relied upon by the District Court in excluding the medical records involved either multiple tortfeasors or issues relating to divisibility and apportionment of damages. This is not such a case. Still, the District Court determined, pursuant to *Truman*, that BNSF was required to produce expert testimony "to prove, to a reasonable medical certainty or probability, that Plaintiff's alleged weightlifting activities/injuries were *either* a distinctly apportionable contributing cause [something BNSF never claimed] *or* a distinctly independent alternative cause of his claimed injuries." (App. C, p. 3 (emphasis in original).) But

evidence of a "distinctly independent alternative cause" does not require expert medical testimony. *See Clark*, ¶ 35. A "distinctly independent alternative cause" disproves the element of causation – which is *the plaintiff's burden* to prove – and has nothing to do with an apportionment of damages defense.

Requiring expert testimony from BNSF was contrary to Cheff's burden of proof, and ignored the realities of medical practice. A doctor does not go to the accident scene or interview witnesses to determine the true cause of a given injury. A doctor determines cause almost exclusively on the basis of what the patient tells the doctor. That was certainly true in this case.

Prior to trial, the parties took the perpetuation deposition of Dr. Hollis. Because the District Court had already issued its order in limine, BNSF cross-examined Dr. Hollis on evidence of alternate cause in a separate portion of the deposition:

> Q. All right. When a history is taken from a patient, the patient is the one who originates the history, true?
>
> A. Correct.
>
> Q. And, typically, what's done in the doctor's practice is you accept that history as accurate unless there's reason to doubt it?
>
> A. Correct. Unless we have – the patient demonstrates a behavior set that is clearly aberrant or there is accompanying documentation from another physician that calls into question the veracity of this patient.

(CR 125, 60:24-61:10.)

Dr. Hollis was then shown the medical records demonstrating that Cheff had originally attributed his injury to weightlifting. Dr. Hollis confirmed he had never seen that history before. (CR 125, 62:21-63:17.) He also confirmed that while a slip and fall was consistent with Cheff's injuries, weightlifting would have been, too:

> Q. And what I'm curious about – If Pat Cheff had come in to you and provided the same history, that is, I was weightlifting, or, I kind of slipped and caused this to come on, and then you found herniated disks, those herniated disks would be consistent with that history; true?
>
> A. They certainly could be, yes, sir.
>
> Q. And if the patient came in and told the same story to you that is reflected in the medical records that I've just shown you and was consistent and stayed with that story, then that would appear throughout your records as the cause of injury; true?
>
> A. Yes, sir.

(CR 125, 63:18-64:6.)

BNSF should have been allowed to introduce this evidence in support of its argument that the cause of the herniated disk was "insidious onset from weightlifting without a belt on," just as stated in the medical records. Cheff stuck with that story until he determined his injury was more serious than he originally believed. It was then that Cheff began to tell his story of alternate cause, and

attributed the injury to an unwitnessed, unreported workplace accident. It is fundamentally unfair that Cheff was essentially granted summary judgment on the element of causation, based entirely on his own say-so, and BNSF was not even allowed to cross-examine Cheff on his prior statements to medical providers.

Denying BNSF's Motion for New Trial, the District Court attempted to distinguish *Clark* by carving out an extremely narrow interpretation of the decision. The District Court found that, even under *Clark*, medical testimony is required whenever the defendant seeks to submit "affirmative evidence" of an "alternative cause of injury." (App. C, p. 3.) However, that same evidence may be admissible for the limited purpose of cross examining a medical expert. (App. C, p. 4.) The District Court suggested that BNSF only needed to ask to use the subject evidence in this limited manner:

> Moreover, unlike in *Clark* and contrary to its after the fact assertion here, BNSF did not, either at or before trial, seek admission of Plaintiff's medical record statements regarding prior weightlifting activities/injuries for the purpose of cross-examining *Plaintiff's medical expert* about the bases of his causation testimony as in *Clark*, *rather than* as direct or indirect evidence of a distinct alternative or contributing cause in contravention of *Truman* and *Olson*.

(App. C, pp. 8-9 (emphasis in original).)

The distinction drawn by the District Court is contrary to the facts and law. First, as to the law, *Clark* and other cases subsequent to *Truman* clarified that the

pertinent distinction is between evidence going to *apportionment*, and evidence challenging *causation*. *Clark* does not limit alternate cause evidence to the cross-examination of medical experts. A fact is a fact and is generally useable for all purposes. In fact, this Court discussed at some length its *Ele* decision, and pointed out that evidence of alternate cause was admitted in that case to cross-examine *the plaintiff*, as well as her experts. *See Clark*, ¶ 24.

In addition, the distinction drawn by the District Court makes no sense. If evidence of a "distinct alternative cause" is admissible to cross-examine a medical expert, why is it off-limits in cross-examining the plaintiff? If it is improper "affirmative evidence" of "alternative cause of injury" when used to cross-examine the plaintiff, why is it entirely proper when used to cross-examine an expert?

The distinction is also deficient from a factual perspective. The District Court brands BNSF's argument as "new," faulting it for not specifically seeking to use the information to cross-examine Cheff's medical experts at trial. But this ignores the breadth of the District Court's order in limine, made long before trial, which BNSF was obligated to obey. The District Court ruled that "BNSF is hereby precluded from presenting evidence, argument, or other reference regarding Plaintiff's off-duty weightlifting or other off-duty activity, including but not limited to any medical history attributing his asserted back injury to off-duty weightlifting

or other off-duty activities." (App. B, p. 21.) This ruling left open *no* possibility that BNSF could have introduced this same evidence to "cross-examine and impeach Dr. Hollis as in *Clark,*" as the District Court now suggests. (App. C, pp. 5-6.)

Moreover, BNSF *did cross-examine Dr. Hollis* with respect to the medical records at issue during his perpetuation deposition. The District Court was promptly informed about this testimony prior to the commencement of trial, but held firm to its prior order and excluded the testimony. After so ruling, it is unfair to now criticize BNSF for not doing more. The District Court's statement that "BNSF did not, as it now opportunistically asserts, want to cross-examine and impeach Dr. Hollis as in *Clark*" (App. C, pp. 5-6) is simply incorrect. BNSF *did* cross-examine Dr. Hollis with the alternative cause evidence, told the District Court about the testimony, and was still denied the opportunity to present the evidence.

B. The Evidence Also Bears on Cheff's Credibility.

The subject evidence is also legitimate impeachment evidence that bears upon Cheff's credibility as a witness. However, the District Court determined admission of the evidence on these grounds would be a "circumvention of the *Truman* analysis under the guise of asserted credibility or impeachment evidence."

(App. B, p. 18 (*citing Olson v. Shumaker Trucking & Excavating Contractors, Inc.*, 2008 MT 378, ¶¶ 29-29, 347 Mont. 1, 196 P.3d 1265).)

In *Olson* – the case relied upon by the District Court – it was established that the worker had suffered significant physical injuries in an on-the-job accident, including PTSD. *Id.*, ¶ 12. A distinct alternate cause was not alleged. Rather, as in *Truman*, the question arose as to what *portion* of the injuries were attributable to the defendant (the plaintiff had a pre-existing anxiety disorder). *Id.*, ¶ 16. Thus, "[t]he case proceeded to trial to determine damages and the extent of the parties' negligence." *Id.* Although the defendant had agreed that its witness was "not going to talk about preexisting conditions and try and [sic] apportion those," it still tried to introduce the evidence for impeachment purposes. *Id.*, ¶ 16, 29-39. This Court held that where the question is one of *apportionment of damages*, and no medical testimony is presented on divisibility of injury, evidence of preexisting conditions is irrelevant, collateral, and immaterial. *Id.*

Unlike the defendant in *Olson*, BNSF did not seek to introduce evidence of other causes to diminish the extent of its liability. *See id. Olson* is inapposite. The evidence should have been admitted to disprove causation, and to challenge the credibility of the single witness to the alleged accident.

III. THE DISTRICT COURT ERRED IN REFUSING TO AWARD INTEREST ON THE $300,000 OFFSET.

The District Court correctly offset the jury verdict by the $300,000 BNSF already paid Cheff in settlement. However, it erred in refusing to assess interest on that amount. Upon contract rescission, the Court's task is to restore the parties to their pre-contract position. *See Cady v. Burton*, 257 Mont. 529, 538, 851 P.2d 1047, 1053 (1993); Mont. Code Ann. § 28-2-1715 and § 28-2-1716. The general rule is that, upon rescission, the payee is entitled to return of the monies paid *plus interest. Brunner v. LaCasse*, 234 Mont. 368, 371, 763 P.2d 662, 664 (1988); *Forsythe v. Elkins*, 216 Mont. 108, 116, 700 P.2d 596, 601 (1985) (emphasis added).

Here, interest on the offset should run from the date of the payment to the date of the District Court's Order, which amounts to approximately $100,000. Denying this credit to BNSF would provide Cheff a windfall of interest income, which is not an element of damage allowable under FELA law.

CONCLUSION

For the reasons stated, this Court should reverse the District Court's grant of summary judgment to Cheff and enforce the release he executed. Alternatively, the Court should reverse the District Court's refusal to allow evidence challenging causation and credibility, and remand for a new trial. In addition, the Court should

remand the case with instructions that, in the event of another verdict against BNSF, BNSF must be given credit for interest on the $300,000 offset.

DATED this 7th day of May, 2010.

BOONE KARLBERG P.C.

By _____

Randy J. Cox
Scott M. Stearns
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11of the Montana Rules of Appellate Procedure, I certify that the foregoing BRIEF OF APPELLANT is proportionately spaced, printed with the typeface Times New Roman, 14 point font, is double-spaced, and contains approximately 9,966 words, excluding the Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service.

DATED this 21 day of May, 2010.

BOONE KARLBERG P.C.

By _____
Randy J. Cox
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CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing BRIEF OF APPELLANT with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing BRIEF OF APPELLANT upon each attorney of record in the above-referenced District Court action, as follows:

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